Supreme Court, U.S.
FILED
MAY - 6 2010
OFFICE OF THE CLERK

161

No. 09-1359

In the
Supreme Court of the United States

RIKARD KRASNIQI,
Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Charles Christophe, Esq.
Counsel of record
CHRISTOPHE & ASSOCIATES, P.C.
2 Wall Street, 8th Floor
New York, New York 10005
212.344.3800
christopheesq@aol.com

Counsel for Petitioner

May 6, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Did the Second Circuit Court of Appeals deny the petitioner his fundamental rights to due process under the Fifth Amendment by affirming the Board of Immigration Appeal's denial of petitioner's motion to reopen in an egregious departure from the accepted and usual course of judicial proceedings?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Petition 1

Citation to Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case 2

Reasons for Granting the Petition 4

Conclusion 7

Appendix:

Appendix A: Second Circuit Summary Order (Dec. 11, 2009) 1a

Appendix B: Board of Immigration Appeals Decision (Sept. 4, 2008) 7a

Appendix C: Immigration Judge Oral Decision (May 18, 2007) 13a

Appendix D: Second Circuit decision denying Petition for Panel Rehearing (Feb. 8, 2010) 25a

TABLE OF AUTHORITIES

Cases

Alvarado-Carillo v. INS,
251 F.3d 44 (2d Cir. 2001) 6

Capric v. Ashcroft,
355 F.3d 1075 (7th Cir. 2004) 4

Consolidated Edison Co. v. NLRB,
305 U.S. 197 (1938) 5

Ding v. Ashcroft,
387 F.3d 1131 (9th Cir. 2004) 6

Georgis v. Ashcroft,
328 F.3d 962 (7th Cir. 2003) 7

He v. Ashcroft,
328 F.3d 593 (9th Cir. 2003) 7

INS v. Elias-Zacarias,
502 U.S. 478 (1992) 4, 5, 6, 7

Ibarra-Flores v. Gonzales,
439 F.3d 614 (9th Cir. 2006) 5

Palavra v. INS,
287 F.3d 690 (8th Cir. 2002) 6

Richardson v. Perales,
402 U.S. 389 (1971) 5

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 6

Secaida-Rosales v. INS,
331 F.3d 297 (2d Cir. 2003) 5

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1961) 5, 6

Uwase v. Ashcroft,
349 F.3d 1039 (7th Cir. 2003) 6

Wiransane v. Ashcroft,
366 F.3d 889 (10th Circ. 2004) 4

Constitutional Provisions

U.S. Const. amend. V 1, 2, 7

Statutes

8 U.S.C. §1105(a)(4) 5
8 U.S.C. §1252(b)(4)(B) (INA §242(b)(4)(B)) 4
28 U.S.C. §1254 1

Other Authorities

Convention Against Torture, art. III 6

PETITION FOR WRIT OF CERTIORARI

Petitioner, Rikard Krasniqi asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Krasniqi v. Eric H. Holder, Jr., U. S. Attorney General*, Docket No., 08-4850 (2d Cir. 2009), is attached to this petition as **Appendix A**. The agency opinions issued by the Immigration Judge, then adopted and affirmed by the Board of Immigration Appeals, *In re Rikard Krasniqi*, No. 099-683-389 (BIA September 4, 2008) (Immigration Judge May 18, 2007), are attached hereto as **Appendices B and C**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment denying the timely submitted petition for rehearing on February 8, 2010, a copy of which is attached as **Appendix D**. The Court of Appeals denied Krasniqi's timely petition for review of the decision of the Board of Immigration Appeals on December 11, 2009. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprives Mr. Krasniqi of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Court of Appeals' improper application of the substantial evidence standard as a means of reviewing a claim for asylum. The Circuit Court in applying the substantial evidence standard to review the matter of Rikard Krasniqi misapplied the standard by failing to review the record in a cumulative manner. The Court of Appeals' decision is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Krasniqi's Fifth Amendment rights. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decisions below.

Petitioner, Rikard Krasniqi, is a native and citizen of Kosovo. Petitioner was born on September 2, 1984 in Peje, Kosovo (the former Yugoslavia). Petitioner came to the United States because he felt his life was in danger as the result of him being an activist for the Youth Forum of the Democratic Christian Party of Kosovo (hereinafter, "Youth Forum").

Petitioner joined the Youth Forum in November 2001, although he never held a position in the group. As a member of the Democratic Christian party, Petitioner participated regularly in meetings, passed out fliers and advocated that the party's position is for peace, respect for all ethnic groups and freedom.

In addition to his activities for the Democratic Christian Party, Petitioner also did volunteer work with Caritas, a humanitarian organization affiliated with the Catholic Church. While working with this organization, Petitioner helped to organize summer camps for children who were Albanian, Serbian and all other minorities.

Petitioner first started having problems on October 23, 2004 when he was returning home from voting in the election. He was walking home when he was attacked by masked men who called him a traitor for "aiding and helping Serbs" that "killed your population." The men hit Petitioner with their fists and kicked him in the stomach. The attack lasted approximately 20 minutes. Petitioner fainted and lost consciousness. Petitioner was bleeding through his nose and had contusions on his body. Petitioner had received anonymous letters and threatening phone calls before the attack.

After the beatings, Petitioner stopped his participation in political activities. Out of fear Petitioner and his family went into at his grandparents' home. Even while at his grandparents' house, Petitioner still felt unsafe because he believed that "those people are all over in Kosovo and they can find you right away."

Petitioner, his parents and brother left Kosovo and went to Skopje, Macedonia by car. They then traveled through Mexico City and Monterrey and eventually entered the United States on May 15, 2005.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings.

> **The Court of Appeals for the Second Circuit arbitrarily and capriciously misapplied the substantial evidence standard in reviewing the merits of the Krasniqi's application for asylum**

The Petitioner respectfully contends that the Court of Appeals for the Second Circuit arbitrarily misapplied the substantial evidence standard in the instant matter. This Honorable Court should review the decision of the Second Circuit Court below, as the same was in contravention of the Court's precedent and arbitrarily and capriciously failed to investigate whether the decision to deny relief to the Petitioner could pass muster under the substantial evidence standard which has been elaborated by this Honorable Court. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *see also Wiransane v. Ashcroft*, 366 F.3d 889, 887 (10th Circ. 2004); *Capric v. Ashcroft*, 355 F.3d 1075, 1086 (7th Cir. 2004).

In the context of immigration matters, the substantial evidence test is the applicable standard of review of removal decisions. *See* INA §242(b)(4)(B), 8 U.S.C. §1252(b)(4)(B). Under the substantial evidence

standard, a final agency determination will be reversed if it is not supported by "reasonable, substantial and probative evidence on the record as a whole." *See* 8 U.S.C. §1105(a)(4). *See also INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Traditionally, the substantial evidence test requires that the reviewing agency, in determining matters, rely on more than a "scintilla" of evidence and that it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *See also Richardson v. Perales*, 402 U.S. 389, 401 (1971). *See also Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006). Accordingly, in order to find that such a scintilla of evidence exists, the Court is bound to review the evidence submitted to evaluate whether the evidence being offered is so "relevant [...] as a reasonable mind might accept as adequate to support a conclusion." *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1961), this Honorable Court further elaborated the appropriate standard for the application of the substantial evidence test finding that in order to be properly deemed applied the evidence being proffered *must be substantial* after taking into account "whatever in the record detracts from its weight." Under the substantial evidence standard, the final agency determination will be reversed if not supported by "reasonable, substantial and probative evidence on the record as a whole." *See* 8 U.S.C. §1105(a)(4); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Secaida-Rosales v. INS*, 331 F.3d 297, 305 (2d Cir. 2003) (*quoting Diallo v. INS*, 232 F.3d 279, 287 (2d Cir.

2000)). In this case, the "record as a whole" does not support the Third Circuit's decision.

In the asylum, withholding and CAT context, the substantial evidence standard mandates reversal only where the reviewing court finds that the evidence not only supports a contrary conclusion, "but compels it." *INS v. Elias-Zacarias*, 502 U.S. 478, 484 n.1 (1992). In *Palavra v. INS*, 287 F.3d 690 (8th Cir. 2002) the court relied on the standard in *Universal Camera Corp.* and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) and reversed the finding of removal for failure to consider evidence which was contained in the record. Similarly, sister Courts to the Second Circuit, in applying this standard, have found that a decision to deny relief cannot be supported when it fails to comply with these tests. Specifically, in *Ding v. Ashcroft,* 387 F.3d 1131, 1136 (9th Cir. 2004), an Immigration Judge's decision was reversed in a Chinese forced abortion and birth control opposition case because the Immigration Judge had made an adverse credibility finding which was ultimately found to be unsupported by substantial evidence as it was based upon speculation, conjecture and an inappropriate legal standard. Similarly, in *Alvarado-Carillo v. INS*, 251 F.3d 44, 49 (2d Cir. 2001), the Second Circuit reversed the Board of Immigration Appeal's denial of asylum and noted that more than a mere scintilla of evidence was necessary to compel a conclusion of a negative finding. Various other matters seeking the analogous relief of asylum, withholding and relief under Article III of the Convention Against Torture have come under consideration in courts below with regard to the appropriate application of the substantial evidence standard. *See e.g Uwase v. Ashcroft*, 349 F.3d 1039 (7th Cir. 2003)(*reversing* IJ determination not based

upon substantial evidence and where undue weight was given to lack of corroborating testimony); *Georgis v. Ashcroft*, 328 F.3d 962, 967–70 (7th Cir. 2003) (*reversing* denial of asylum under *Elias-Zacarias* standard where minor inconsistencies would have been easily resolved by other facts in evidence and could have been explained by improperly excluded evidence); *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003)(*reversing* Board's adverse credibility determination under the substantial evidence standard).

In this case, Mr. Krasniqi presented substantial evidence showing a well-founded fear of persecution should he be forced to return to Kosovo because he was involved with the Democratic Christian Party and assisted Serbian ethnics.

The Second Circuit's conclusory statement finding that "substantial evidence supported the agency's conclusion that Mr. Krasniqi failed to demonstrate that he had a well-founded fear of future persecution" is arbitrary, capricious and lacks support within the ambits of its own precedential decisions and as such is a clear violation of Mr. Krasniqi's Fifth Amendment rights.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Charles Christophe, Esq.
Counsel of record
CHRISTOPHE & ASSOCIATES, P.C.
2 Wall Street, 8th Floor
New York, New York 10005
212.344.3800
christopheesq@aol.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A:	Second Circuit Summary Order (Dec. 11, 2009)	1a
Appendix B:	Board of Immigration Appeals Decision (Sept. 4, 2008)	7a
Appendix C:	Immigration Judge Oral Decision (May 18, 2007)	13a
Appendix D:	Second Circuit decision denying Petition for Panel Rehearing (Feb. 8, 2010)	25a

APPENDIX A

MANDATE ISSUED ON 03-08-2010

08-4850-ag
Krasniqi v. Holder

BIA
Abrams, IJ
A099 683 389

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

08-4850-ag
NAC

[Filed December 11, 2009]

RIKARD KRASNIQI,
Petitioner,

v.

ERIC H. HOLDER, Jr., U.S. ATTORNEY GENERAL,[1]
Respondent.

SUMMARY ORDER

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr., is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of December, two thousand nine.

PRESENT:

DENNIS JACOBS,
Chief Judge,
ROGER J. MINER,
DEBRA ANN LIVINGSTON,
Circuit Judges.

FOR PETITIONER:	Charles Christophe, New York, New York.
FOR RESPONDENT:	Tony West, Assistant Attorney General, Susan Houser, Senior Litigation Counsel, Steven F. Day, Trial Attorney, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Petitioner Rikard Krasniqi, a native of the former Yugoslavia, seeks review of a September 4, 2008 order of the BIA affirming the May 18, 2007 decision of Immigration Judge ("IJ") Steven R. Abrams, denying his applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Rikard Krasniqi*, No. A099 683 389 (B.I.A. Sep. 4, 2008), *aff'g* No. A099 683 389 (Immig.

Ct. N.Y. City May 18, 2007). We assume the parties' familiarity with the underlying facts and procedural history of the case.

When the BIA affirms the IJ's decision in some respects but not others, this Court reviews the IJ's decision as modified by the BIA decision, i.e., minus the arguments for denying relief that were rejected by the BIA.[1] *See Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 522 (2d Cir. 2005). We review the agency's factual findings under the substantial evidence standard. 8 U.S.C. § 1252(b)(4)(B); *see also Corovic v. Mukasey*, 519 F.3d 90, 95 (2d Cir. 2008). We review *de novo* questions of law and the application of law to undisputed fact. *See, e.g., Salimatou Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008).

As an initial matter, there is no merit to Krasniqi's argument that the BIA erred by declining to review the IJ's adverse credibility finding. The BIA is not required to address all of the bases for the IJ's decision and may, instead, affirm the IJ's decision in only some respects or, indeed, not at all. *See* 8 C.F.R. § 1003.1(d)(3); *Xue Hong Yang*, 426 F.3d at 522.

The record supports the agency's conclusion that Krasniqi did not demonstrate that he suffered past persecution. Past persecution requires that the harm be sufficiently severe, rising above "mere harassment." *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 341 (2d Cir. 2006). Here, the agency reasonably found that

---

[1] We assume for purposes of our analysis that the BIA rejected the IJ's adverse credibility determination. *See Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005).

the "harassment and single episode of violence Krasniqi endured, which did not require medical attention, [did] not rise to the severe nature of persecution." Although Krasniqi claimed to have suffered a bloody nose during the incident, the agency correctly determined that this was insufficiently severe to constitute persecution, particularly because the incident did not occur while Krasniqi was in custody. *Cf. Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006) (cautioning the BIA to be "keenly sensitive" to the fact that a "minor beating, or for that matter, any physical degradation designed to cause pain, humiliation, or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground").

Furthermore, substantial evidence supports the agency's conclusion that Krasniqi failed to demonstrate that he had a well-founded fear of future persecution. *See* 8 C.F.R. § 1101(a)(42). Krasniqi argues that his fear of Albanian extremists is objectively reasonable because he was involved with the Democratic Party and previously assisted the Serbs. However, as the BIA found, the evidence "[did] not indicate that the Democratic Christian Party, for which [Krasniqi] worked, [was] targeted for violence by Albanian extremists," and in any event, he did not show that he could not relocate to another part of the country. Indeed, although Krasniqi testified that he felt unsafe after he briefly relocated to his grandparents' house in another part of Kosovo, he acknowledged that he had not been harassed there. *See* 8 C.F.R. § 1208.13(b)(2)(ii). Thus, the BIA properly found that Krasniqi was ineligible for asylum relief.

Because Krasniqi failed to establish the objective likelihood of persecution required to establish eligibility for asylum, his withholding of removal and CAT claims were properly rejected. *See Paul v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006); *Xue Hong Yang*, 426 F.3d at 523.

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:/s/ Richard Alcantara
Richard Alcantara, Deputy Clerk

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

[SEAL]
Catherine O'Hagan Wolfe

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A099 683 389 - New York, NY

Date:
SEP - 4 2008

In re: RIKARD KRASNIQI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
James D. Cristo, Esquire

ON BEHALF OF DHS:
David Shteingart
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The appellant, a native and citizen of Serbia/Kosovo, appeals an Immigration Judge's May 18, 2007, decision denying the respondent's application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158 and 1231(b)(3), and protection under the Convention Against Torture. The appeal will be dismissed.

We affirm the decision of the Immigration Judge to the extent that the Immigration Judge found that the respondent failed to meet his burden to establish past persecution on account of a protected ground, a well-founded fear of future persecution, or a clear probability of persecution or torture if returned to Serbia/Kosovo. *See* I.J. at 5-12. *See also* 8 C.F.R. § 1003.1(d)(3)(ii) (providing that the Board may review questions of law in appeals from decisions of Immigration Judges *de novo*). The only alleged acts of past persecution identified by the respondent were threatening telephone calls/letters and one incident when he was beaten up by unidentified/masked individuals.[1] *See* I.J. at 7; Exh. 2; Tr. at 47-55. We agree with the Immigration Judge that this harassment and single episode of violence, which did not require medical attention, does not rise to the

---

[1] The respondent has also alleged acts of persecution by Serbian forces against him and his family prior to the United Nation's and NATO's intervention in the ethnic violence in Kosovo. *See* Exh. 2. However, the respondent did not argue at his hearing or on appeal that these acts are the basis for his current asylum application. *See* Tr. at 29, 47.

severe nature of persecution as contemplated by the Act. *See Ivanishvili v. United States Dept. of Justice*, 433 F.3d 332, 341 (2d Cir. 2006).

The respondent argues that the Immigration Judge erred by not considering acts of persecution directed against the respondent's father. However, the Immigration Judge did consider this evidence, but found it carried little probative weight as the respondent's father did not provide testimony or make himself available for cross-examination. *See* I.J. at 9-10. Furthermore, the country condition reports indicate that the political party to which the respondent's father allegedly belonged is now the party controlling the Kosovo Government. *See generally* Exhs. 5, 5b, 6. Therefore, we find no error in the Immigration Judge's weighing of the evidence contained in the father's asylum application. *See* section 240(c)(4)(B) of the Act (providing that an Immigration Judge is charged with weighing credible testimony with other evidence of record in determining whether the alien has met his burden of proof).

The respondent does not challenge the Immigration Judge's factual findings below, except to the extent that the respondent argues that the Immigration Judge erred in not considering and giving weight to the documentary evidence of country conditions in Kosovo, which the respondent contends establishes that he would be persecuted for assisting ethnic minorities through nongovernmental and minority party organizations. *See* Exh. 2; Tr. at 29, 32, 36-37, 46. We agree with the Immigration Judge that the documentary evidence on country conditions fails to establish that the respondent has a well-founded fear of persecution or clear probability of torture if returned

to Kosovo. *See* I.J. at 5-6, 10. While there is evidence of sporadic incidents of human rights abuses in Kosovo, the documentary evidence indicates that these incidents are not directed or supported by the United Nations forces controlling Kosovo or the Kosovo Government. *See* Exh. 4 at 18-23, 28-29. *See generally* Exhs. 5, 5b. The documentary evidence does not show that there is any pattern of persecution or violence against ethnic Albanians of Catholic faith, such as the respondent, and individual acts of violence or harassment directed against minorities, which the respondent alleged to have helped through his civic and religious organizations, is actively opposed by the authorities controlling Kosovo. *Id.* Furthermore, this evidence does not indicate that the Democratic Christian Party, for which the respondent worked, is targeted for violence by Albanian extremists. *Id.* Regardless of the country condition reports, the respondent has acknowledged that the acts of harassment against him did not occur when he was relocated at his grandparent's house in another part of Kosovo. *See* Tr. at 85-86. As the respondent has not referred to any portion of the country condition reports which specifically supports his contention on appeal, and the respondent's contention on appeal itself is insufficient to meaningly challenge the Immigration Judge's decision, we find no clear error in the Immigration Judge's findings of fact. *See* 8 C.F.R. § 1003.1(d)(3)(i).

In addition, the respondent argues that the Immigration Judge exhibited bias against him by conducting the hearing in a "wholly inappropriate manner" and "failed to demonstrate impartiality." The only concrete example of this bias offered by the respondent was that the Immigration Judge failed to

allow additional time to the respondent to develop corroborative evidence. We find no bias or error in the Immigration Judge's conduct during the hearing or in the alleged denial for a continuance for development of additional evidence.[2] *See generally* sections 240(a), (b) of the Act. The respondent has presented substantial documentation to support his application and had more than seven months from his master hearing on October 17, 2006, to his individual hearing on May 18, 2007, to prepare his case with the assistance of counsel. The respondent has not cited to any evidence that would have been available with further development and has failed to establish that the Immigration Judge's actions prejudiced his application. Also, the respondent argues that the Immigration Judge showed bias by not providing separate analysis of each form of protection to include asylum, withholding of removal, and protection under the Convention Against Torture. This is not true as the Immigration Judge addressed each avenue of protection from removal in his decision. *See* I.J. at 11-12.

Based on the foregoing analysis, we agree with the Immigration Judge that the respondent is not eligible for asylum. Since the respondent failed to satisfy the lower statutory burden of proof required for asylum, it follows that he also failed to satisfy the higher clear probability standard of eligibility required for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984). *See also* 8 C.F.R. § 1208.16(b). As discussed above, the evidence does not establish a clear

---

[2] Our review of the record does not reveal any written or oral motion by the respondent or his attorney for a continuance.

probability that the respondent would be tortured if returned to Kosovo. Because we agree with the Immigration Judge that the respondent failed to meet his burden of proof on the aforementioned basis, we need not address the Immigration Judge's alternative credibility determination or the respondent's related arguments on appeal. *See* I.J. at 10.

Accordingly, the following order will be entered:

ORDER: The appeal is dismissed.

/s/ _____
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
26 Federal Plaza
New York, New York

File A 99 683 389

[Dated May 18, 2007]

In the Matter of	)
RIKARD KRASNIQI,	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Immigration and Nationality Act Section 212(a)(6)(A) - entered the United States without inspection

APPLICATIONS:

Asylum, pursuant to Section 208 of the Immigration and Nationality Act;

Withholding of removal to Serbis-Kosovo, pursuant to Section 241(b)(3) of the Immigration and Nationality Act; and

Withholding of removal to Serbia-Kosovo pursuant to Convention Against Torture.

ON BEHALF OF
RESPONDENT:

James Cristo, Esquire
321 Broadway, Third Floor
New York, New York 10007

ON BEHALF OF DHS:

David Steinguard, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 22-year-old native and citizen of Serbia-Kosovo. He arrived in the United States by coming across the border of Mexico and U.S. on May 15, based on his testimony and his mother's testimony. In his I-589, he had originally indicated that it was May 24. Either date still would have been sufficient. The respondent, once he was in the United States, he filed his application for asylum. The application was filed on March 20, 2006, so either date, the 15th or the 24th would have been within the one-year period of time. The I-589 was denied.

The respondent was placed under proceedings by the filing of a Notice to Appear, Form I-862 with the immigration court. The respondent came before the Court, admitted the truth of the allegations, conceded that he was, in fact, removable from the United States under Section 212(a)(6)(A)(i) that he entered the United States without inspection. He contended at that time he came in on May 24th. He's corrected that

to the May 15th date. The charges are sustained, based on the concession of consul, which qualifies as reasonable, probative, and substantial evidence. See Matter of Rico, 16 I&N Dec. 181, 195, (BIA 1977).

The respondent renewed his application for asylum and we marked the I-589 as Exhibit 1 in this case. The request for asylum is also considered as a request for withholding of removal to Serbia-Kosovo under Section 241(b)(3) of the Immigration and Nationality Act. A request for asylum was forwarded to the United States State Department pursuant to 8 C.F.R. 240.11(c)(2). We did not receive a response from the State Department. But we have a copy of the country reports and additional background documentation submitted for both parties. The country reports are under Exhibit 4. The additional background material is under Exhibit 5.

The respondent testified, as did his mother, who is also under proceedings in a different court, along with her husband and other son. The husband did not come forward to testify. We were given his I-589. The Court would have rather had the opportunity to cross-examine him, based on the statements that he made in the I-589, and there was some concern as far as some of the statements he made in the I-589 that they did not conform to what the respondent has testified before this court.

The respondent, who is seeking asylum, must demonstrate his status as a refugee, as defined by Section 101(a)(42) of the Immigration and Nationality Act. That definition indicates the respondent must demonstrate he has suffered persecution in the past, has a well-founded fear of persecution in the future, on

account of race, religion, nationality, membership in a particular social group or political opinion.

Here, as counsel has pointed out, it's somewhat of an imputed political opinion. He is not a political activist as such, but he's been involved in voluntary charitable work, to say the least, of individuals who are in Kosovo, without any concern as to their ethnic or religious background. He's indicated that helps all and the groups that he belongs to, clearly establish that, for the Court, what his endeavors have been.

As far as his political activity, he has indicated that his father may have been politically active, but he was not in a sense politically active. He said he belonged to the youth forum. But as far as his activities for that organization, he went to some meetings. He was not a leader of the organization. And based on what he says, as to the reasons why he believes he was beat up, those individuals did not like what he was doing in his charitable work, clearly making indications as to the individual assisting Serbians and other non-Albanians that may have been actually fighting against them during the war in Kosovo.

The respondent testified that he didn't have any problems. He was receiving some phone calls and he indicated that he then had a problem on October 23, 2004. He said he had been returning from voting on that day. He was coming across a park. It was dusk, just getting to be dark at that time, approximately about 6:30 at night when he was approached by four men who were in masks. He could not identify them, didn't know who they were, where they were from. They did in fact beat him up. The injuries he sustained were not excessive. He indicated he may have gotten

a bloody nose and some bruises on his body. He also stated he may have fainted during this period of time and they left him alone. They did not continue to beat him.

The question is who were these individuals. There is nothing in the documentation that I have to be able to establish who these people are. Are there individual pockets of individuals who are what one may say are prejudicial as such? Could they have been neighbors? Could they have been individuals that know him? That's a possibility.

But there wasn't any investigation done at all. There wasn't any. He didn't take the information that he had to the police or to the UN Commission in Kosovo. These are individuals who have tried to maintain peace in the area in Kosovo. He said he did go to a friend of his that was the leader of the youth group that he had in fact been part of, the Englebert Szefaj. He said that he had a conversation with them and the individual informed him that the best thing to do would be to go to the police to seek out assistance.

The respondent also testified that he doesn't know of anyone, as far as anyone in any of these organizations that he's been associated with, that have had similar problems. Clearly, the individual who he had gone to see is still in Kosovo, the head of the Christian Democratic Party is still in Kosovo. It is clear that there are organizations in Kosovo that are trying to straighten things out and to root out some of the problems that are in Kosovo.

The question is whether or not it is so systemic that the individual, no matter what he may believe, that all

the individuals that may help the underprivileged are now being threatened in Kosovo. The Court does not believe that that's the background material, even the documentation from the State Department clearly indicates that there's reason to believe that the UN is in fact establishing a presence in Kosovo and has established a presence in Kosovo to quell the ethnic violence there, without even indicating that this individual is subject to ethnic violence as such, only that he may be assisting other individuals who may be of a different ethnic background.

The Court was also concerned, as far as the respondent's statements that he's made to this Court, as to when the incident took place and where he was at that time. It's, according to his testimony, after this particular incident, he then took off and went to his grandmother's house. And he kept a low profile, to say the best way of putting it. In doing so, he didn't have any problems while he was at his grandmother's house and the Court is concerned as to whether or not he could not be able to relocate in the area, that according to him, was approximately one hour to 45 minutes away from where he was living. He never indicated that he had any problems while he was at his grandmother's house.

The requirement of well-founded fear is met by a showing of circumstances in which a reasonable person would fear persecution. Matter of Mogharabbi, 19 I&N Dec. 439 (BIA 1987). As the Court pointed out, the only incident that took place was this one incident, where he indicated he was beaten up by four unknown individuals. The objective reasonability of persecution as well as the respondent's subjective fear, both must be established. INS V. Cardoza-Fonseca, 480 U.S. 421

(1987). Where the respondent establishes past persecution, and he contends that the one incident that has taken place is the past persecution. The Court doesn't believe that that one incident in and of itself rises to the level of persecution.

In some cases, the main evidence of the respondent's fears is met through the respondent's own testimony. Such voluntary evidence may suffice if the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of the respondent's fear. Mogharrabi Supra 445. However, whenever supporting evidence is available, it should be presented Matter of Dass 19 I&N Dec. 120 (BIA 1989).

Here the respondent has provided us with some supporting documentation. That documentation, regarding the incident that took place with him, comes in the form of his mother who testified that he was beaten or at least came home beaten. The facts and circumstances surrounding what may or may not have happened to him are unknown to her and she was unable to testify to that. There was no testimony from her regarding the threats being made to her son, at the time that he was being beaten or having problems at that period of time.

The respondent has provided us with also documentation regarding the involvement with the youth center. But the Court is questioning that particular document, only because the document was issued well before the individual had any problems, before he was beaten up. It was issued about a year prior to that. I asked the question as to why it may have been issued, as to what was the document for

when it had been issued, and he was unable to explain it, other than it was being presented to this court to show that the individual was in fact a member of that organization.

The Government had pointed out the Democratic Christian Party organization had in fact given us a letter and the question is as to who may have requested the letter. According to the respondent, he requested the letter from his friend and he believes that this letter may have come because of that inquiry. The Court has no way of knowing that, because it doesn't indicate anywhere in the letter, as to who may have in fact inquired about the letter or why it was being written. The only thing that pertains to the respondent, other than the fact that it says he was part of the Albanian Demo Christian Youth Forum, is the fact that they indicate that he had in fact been attacked by people who were unknown and remain unknown or unidentified today. Again, we don't know who these people are. We don't know why they may have in fact attacked him and what relationship they may have to any organization, independent or not. And it is the concern of the Court that we are unable to establish that before the court.

In the final analysis, the respondent bears the evidentiary burden of proof and persuasion in applications for asylum, 8 C.F.R 208.13(a) 1987. The respondent who is seeking withholding of removal from any country must show that such a respondent's life or freedom would be threatened in his country on account of one of the protected grounds. In order to make this showing, the respondent must establish a clear probability of persecution INS v. Stevic, 467, U.S. 407. (1984). This clear probability standard requires a

showing it is more likely than not the respondent would be subject to persecution. See 8 C.F.R. 208.16 (b) 1997.

The Court has also had the opportunity to listen to the respondent and to assess the credibility of the individual. I've had the opportunity to observe the demeanor of the respondent and had an opportunity to listen carefully to the statements that he's made. Many of the times, he's indicated that his father had been involved in politics and that his father had been beaten up. The concern the Court has is that, when he testified today regarding his father being beaten up, he said that he was at his grandmother's house during that period of time. The mother on the other hand, testified that he wasn't, that he was somewhere around the house. This is a concern, if one would know where they were when the father was beaten. According to the father's affidavit, it doesn't indicate he had been beaten other times during this period of time. This is one incident that he talks about regarding being beaten on that February date.

What was most disturbing, in reading both of these affidavits together, how they are almost dove-tailing each other to say the least. When the father talks about his being beaten up, he immediately indicates in that time after he was beaten: "I summoned the strength to get up to make a phone call to my son, Rikard." Nowhere in his testimony did Rikard ever tell us that he ever received a phone call from his father. I don't have the father present. I don't have any way of asking him any questions. He didn't present himself to this court. And so it's just a question as to whether or not I'm listening to the truth in this individual or not. He could have presented his father to testify but he

decided that his father had better things to do than to come here and help his son.

The Court feels that the testimony of the respondent is not credible. I do not believe the testimony of the respondent. The inconsistency between him and his mother and his father, regarding the incidents that have taken place, have raised the problem with the Court as far as his credibility is concerned. Has he been involved in some of these organizations. There's a strong possibility that he is. But being a member of those organizations, in and of itself, does not rise to the level that one should fear because clearly those organizations still exist. Those individuals are still there and there's nothing in the background material that I have that these individuals are in fact being attacked by the conservative Albanians in Kosovo.

The Court feels that the respondent's testimony is not sufficient by itself to establish a factual basis to allow it to find that the respondent meets the statutory definition of refugee.

Moreover, the documentary evidence is insufficient to make up for the testimonial deficiency. The documentary evidence relates to general conditions in Kosovo and by itself, the documentary evidence fails to establish that the respondent has been harmed in the past. Clearly, he may have been beaten. If in fact that had taken place, just like the question as to whether or not the husband had in fact been beaten, goes to the inconsistencies in the testimony that was given by the respondent and his mother.

The Court feels that accordingly, the respondent has not met his burden of establishing eligibility for asylum. Moreover, the Court feels the respondent has failed to satisfy standard of proof for asylum, he has also failed to satisfy the higher standard of proof necessary for withholding of removal to Kosovo under Section 241(b)(3) or under the Convention Against Torture.

To qualify for relief under the Convention Against Torture, an alien must show it is more likely than not he would be tortured for any reason if removed to the proposed country of removal.

Torture is an extreme form of cruel and inhuman treatment done at the instigation of or with the acquiescence of a public official or other person acting in an official capacity.

There's nothing here to believe that this individual would in fact be tortured at the acquiescence of a public official or anyone acting in an official capacity. Consequently, he's not eligible for relief under the Convention Against Torture.

Accordingly, the following order will be entered:

ORDER

The respondent's request for asylum under Section 208 of the Immigration and Nationality Act is denied.

The respondent's request for withholding of removal to Serbia-Kosovo pursuant to Section 241(b)(3) of the Immigration and Nationality Act is denied.

The respondent's request for withholding of removal to Serbia-Kosovo pursuant to the Convention Against Torture is denied.

The respondent is ordered removed from the United States pursuant to 212(a)(6) of the Immigration and Nationality Act.

STEVEN R. ABRAMS
Immigration Judge

Immigration Court
26 Federal Plaza

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-4850-ag

[Filed February 8, 2010]

RIKARD KRASNIQI,	)
Petitioner,	)
	)
v.	)
	)
ERIC H. HOLDER, Jr., U.S. ATTORNEY GENERAL,[1]	)
Respondent.	)
	)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of February, two thousand ten.

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr., is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

PRESENT:

DENNIS JACOBS,
Chief Judge,
ROGER J. MINER,
DEBRA ANN LIVINGSTON,
Circuit Judges.

Rikard Krasniqi having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
Catherine O'Hagan Wolfe, Clerk